United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7458

To be argued by
JESSE J. FINE

United States Court of Appeals
FOR THE SECOND CIRCUIT

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself, her infant child, TODD, and her interuterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

against

GEORGE K. WYMAN, as Commissioner of the New York State Department of Social Services, and JAMES M. STUART, as Commissioner of the Nassau County Department of Social Services,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

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United States Court of Appeals

FOR THE SECOND CIRCUIT

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CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself, her infant child, TODD, and her interuterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN as individuals and on behalf of all other persons similarly situated,

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Questions Presented

1. Since the State Regulation under attack has been amended; since the Federal Regulations involved have been amended; and since no retroactive award of money damages to the appellees is permissible, has the litigation become moot?

2. If not, are the State's Regulations in the form passed upon by the District Court in 1972 (or in their newly amended form), regarding recoupment of advances made to forestall eviction, in conflict with the Social Security Act or HEW Regulations?

The Court below answered the second question in the affirmative. It did not, in 1972, have occasion to decide the first question.

Statement

(1)

The history of this litigation is stated in the opinion of this Court dated June 2, 1972, *Hagans* v. *Wyman,* 462 F. 2d 928; in the opinion of this Court dated January 3, 1973, *Hagans* v. *Wyman,* 471 F. 2d 347; and in the opinion of the Supreme Court of March 25, 1974, reported *sub nom. Hagans* v. *Lavine,* —— U.S. ——, 39 L. Ed. 2d 577. [Mr. Lavine became the State's Commissioner of Social Services on May 1, 1972, and was substituted for Mr. Wyman as the defendant-appellee in the proceeding before the Supreme Court of the United States.]

The object of the litigation was to declare Regulation 18 NYCRR § 352.7(g)(7) to be (1) unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and (2) contrary to the provisions of the Social Security Act and regulations thereunder promulgated by the Department of Health, Education and Welfare (HEW) relating to the Aid to Families with Dependent Children (AFDC) program.

This Court held in its decision of January 3, 1973, that Regulation 18 NYCRR § 352.7(g)(7) had a rational basis and that there was no substantial constitutional claim. It held, therefore, that the District Court was without jurisdiction to consider the "statutory" claim of conflict

between the state Regulation and the Social Security Act and HEW Regulations. It remanded the case with an instruction to dismiss for lack of jurisdiction.

The Supreme Court held that the claim of unconstitutionality had sufficient ostensible merit to confer jurisdiction on the District Court over *both* the constitutional and statutory claims; that the statutory claim was to be decided first and by a single judge. The Supreme Court remanded the case to this Court for further proceedings. This Court by its order of May 16, 1974, directed that further briefs relating to the "statutory" claim be filed.

(2)

This Court's decision of January 3, 1973, was on appeal from an order of the District Court for the Eastern District of New York (MISHLER, C.J.), of October 19, 1972. In granting the order, Chief Judge MISHLER wrote an opinion dated October 19, 1972, dealing with the "statutory" claim. He held Regulation 18 NYCRR § 352.7(g)(7)* contravened the Social Security Act and HEW Regulations.

This Court, on October 26, 1972, stayed, pending appeal, Chief Judge MISHLER's judgment of October 19, 1972.

(3)

On April 15, 1973, HEW published an amendment to its existing Regulation 45 CFR § 233.20(a)(ii)(d) by adding a Regulation numbered 45 CFR § 233.20(a)(12)(i), effective October 15, 1973. In relevant part, the added provision is as follows:

"§ 233.20 Need and amount of assistance.

(a) Requirements for State plans. * * *

* * * * * *

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* The Regulation was originally numbered § 352.7(g)(6) but in December 1971 was renumbered § 352.7(g)(7).

(12) Recoupment of overpayments and correction of underpayments. Specify uniform Statewide policies for:

(i) Recoupment of overpayments of assistance, including overpayments resulting from assistance paid pending a hearing decision; Under this requirement:

(A) The State may recoup any overpayment * * *

(B) Except where there is evidence which clearly establishes that a recipient willfully withheld information about his income and resources, recoupment shall be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered;

(C) The plan may provide for recoupment from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payments or from both;

(D) If the payments are made from current assistance payments, the State shall establish reasonable limits on the proportion of such payments as may be deducted, so as not to cause undue hardship on recipients;

(E) The plan may provide for recoupment in all situations and in specified circumstances and for the waiver of the overpayment where the cost of collection would exceed the amount of the overpayment."

(4)

On May 29, 1974, the State Department of Social Services amended 18 NYCRR § 352.7(g)(7) to read as follows:

"(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse

the family; such advance shall thereafter be recovered in accordance with Section 352.31 (d) (1)."

18 NYCRR § 352.31(d) newly promulgated on the same day provides as follows:

"(d) Adjustment of grants.

(1) Recoupment of overpayments of assistance, including overpayments resulting from assistance paid pending a hearing decision, shall be treated as follows:

(i) Except as provided in paragraph (2) herein, recoupment shall be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered.

(ii) Recoupment from current assistance payments shall be in amounts equal to 10% of the household needs until such time as the excess payments have been recovered, except that where two or more recoupments are made simultaneously for different reasons or arising from separate circumstances, the total reduction in assistance shall be equal to 15% of the amount of the household's needs. In the event the amount required to be recouped hereby is greater than the amount of the current assistance payments, such payments shall be withheld until the amount of the excess grants have been recouped.

(2) Where there is evidence which clearly establishes that a recipient willfully withheld information about income and resources, recoupment shall be made pursuant to the provisions of paragraph (1) herein; however, such recoupments shall not be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered."

POINT I

No real issue remains in this case. Repayment of the amounts deducted by the State to recoup its advances to prevent eviction is not permissible. The State regulation, the subject of this litigation, has been amended as have the HEW regulations involved. The present appellees have no standing to challenge the new State regulation which did not affect them.

(1)

Chief Judge MISHLER's judgment of October 19, 1972, directed that the State on or after October 1, 1972, not deduct from AFDC benefits paid the appellees to recoup the advances made. The stay of that judgment granted by this Court on October 26, 1972, permitted the State to continue the recoupment of the balances due for the advances made.

Retroactive repayments to the appellees are foreclosed by the decisions in *Edelman* v. *Jordan*, —— U.S. ——, 39 L.Ed. 2d 662, March 25, 1974; *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir., 1972), cert. den., 411 U.S. 921 (1973). In this very case, Judge MISHLER denied retroactive repayments in his first opinion of March 14, 1972, involving the original plaintiffs.

(2)

Those portions of the District Court's judgment holding 18 NYCRR § 352.7(g)(7) as violative of the Social Security Act and of HEW regulations require *de novo* consideration (apart from the merits) in the light of the changes in the State's and HEW's regulations set forth *supra*, pp. 3-5. The present appellees were not affected by these new regulations. They do not represent a class of persons who are so affected. This being so, the lawsuit is moot. *Indiana Employment Security Division, et al.* v. *Burney*, 409 U.S. 540 (1973).

A lawsuit challenging the new HEW Regulation, 45 CFR § 233.20(a)(12)(i), was begun in the United States District Court for the District of Columbia, *National Welfare Rights Organization* v. *Weinberger*, Civil Action No. 1703-73. In an opinion dated April 11, 1974, District Judge PRATT of that District Court held that the cited regulation violated the Social Security Act.

In its brief to that Court, HEW noted that there was no specific statutory provision governing the recoupment of overpayments; that Congress left the question to administrative regulation and judgment; that HEW's regulations from 1951 to the date of the adoption of the new HEW regulation, effective October 15, 1973, have varied from permitting recoupments to prohibiting recoupments except in the case of fraud.

HEW in its brief further argued that the States were indispensable parties to the action. This is clear; the decision affects property rights and money of the States. New York received no notice of the proceeding in the District of Columbia and had no opportunity to participate in it; we believe the decision is jurisdictionally defective.

The decision in that case itself rests on the same bases as the decision on the statutory claim in the case at bar and is in error for the same reasons. HEW referred to its prior position in this present case in its brief, saying at pp. 28 and 29 thereof:

> "HEW also has in the past taken this position in interpreting recoupment from current assistance payments to be in contravention of the availability of income rule, and indeed has expressed such a conclusion in two recent *amicus curiae* memoranda submitted in federal district courts, *Acosta* v. *Swank*, U.S.D.C. N.D. Ill., Civ. No. 69-C-2502, and *Hagans* v. *Wyman*, U.S.D.C. E.D. N.Y., Civil Action No. 72-C-182. While such an interpretation represents a supportable con-

struction of the statute and the regulations, however, the view does not appear to be mandated by the Act, or indeed even the provisions of the federal regulation governing the availability of income, 45 C.F.R. 233.20 (a)(3)(ii)(*c*), but, rather, is but one possible construction of the Act."

POINT II

New York's Regulation, 18 NYCRR § 352.7(g)(7) is not in conflict with the Social Security Act or the Regulation of HEW.

If this Court determines to consider the statutory claim with respect to the State's Regulation 18 NYCRR 352.7(g)(7) in the form in which it existed at the time of the decision below (or in its present form) the following argument is presented. It deals first with the claimed conflict with the Social Security Act; then with the claimed conflict with HEW Regulation 45 CFR § 233.20(a).

In view of the present uncertain status of the new HEW Regulations effective October 15, 1973, set forth *supra* at pp. 3-4, we will not discuss them except to comment that they clearly indicate that HEW has adopted the policy of approving State recoupments of the type here involved.

1. Section 352.7(g)(7) is consistent with the purpose and language of the Social Security Act.

The State of New York has the humane policy of guaranteeing shelter for welfare recipients. Rather than allowing recipients to be evicted from housing because they have misallocated their shelter allowances, the State makes an "advance allowance" of the rent to forestall the eviction. This advance allowance is given only upon the consent of the recipient and with the understanding that the monies advanced will be recouped over the next six

months.* Since this extra payment gives the recipient money to which he or she would not be entitled under any state or federal regulation, *Morgan* v. *Kennedy*, 331 F. Supp. 861 (D. Neb. 1971), the State requires that the money be recouped over the next six months. Not only does this ensure that recipients who misallocate their grants will not be rewarded for their lack of care as opposed to recipients who properly allocate their grants, but the recoupment provision acts as a deterrent to misallocation in the hope of helping recipients to achieve the objective of the Social Security Act to "attain or retain capability for self-support and care". 42 U.S.C. § 602 (a)(14), 42 U.S.C. § 601.

There is no federal requirement that a State reimburse recipients who misallocate their grants. *Morgan* v. *Kennedy, supra.* All the State is obligated to do is supply a shelter allowance consistent with whatever percentage it is paying of the recipient's standard of need. Therefore, in embarking on a program of guaranteeing shelter for welfare recipients, the State of New York finds itself in the anomalous position of being attacked for exercising a greater sense of responsibility than that required by federal law.

The Court below cited 42 U.S.C. 602(a)(7) and 602(a)(10) in holding that the regulation at issue violated the Social Security Act. It apparently accepted appellee's argument that these two sections require that current needs be met. This argument is without merit. The Social Security Act clearly does not require that recipients receive grants to meet their current needs.

In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), the Supreme Court unequivocally ruled that States need not meet a

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* Some of the original named plaintiffs alleged they did not consent to receiving these rent advances. If true this was contrary to state policy. All of the intervening plaintiffs received the advances voluntarily.

recipient's actual standard of need, but may "pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent deduction system". 397 U.S. at 413. While a State cannot obscure the actual standard of need, it can pay as small a percentage of that standard as it wishes. See *Ward* v. *Winstead,* 314 F. Supp. 1225 (N.D. Miss. 1970), app. dism. 400 U.S. 1019 (1971) upholding the payment of only 30% of need to welfare recipients in Mississippi. If it is consistent with the Social Security Act to pay children only 30% of what they need, it is difficult to see how there can be any requirement as to the meeting of current needs.

Plaintiffs maintain that the purpose of the Social Security Act is to aid needy children. That is quite correct. See *King* v. *Smith,* 392 U.S. 309 (1964). However, there is no requirement in that act that mandates that children's needs be met. In *Dandridge* v. *Williams,* 397 U.S. 471 (1970), the Supreme Court rejected this very argument. The plaintiffs in that case alleged that the imposition by Maryland of an upper limit on the total amount of money any one family unit may receive denied benefits to the younger children in a large family. Plaintiffs there, as here, relied on 42 U.S.C. § 602(a)(10), which requires that aid to dependent children "be furnished with reasonable promptness to all eligible individuals". The Court acknowledged that the effect of Maryland's maximum grant statute was "to reduce the per capita benefits to the children in the largest family". 397 U.S. at 477. However, the Court held that it was the *family* grant that mattered. The Maryland statute did not violate 42 U.S.C. § 602 (a)(10).

After noting that it was the states that had the undisputed power to set the level of benefits and the standard of need, 397 U.S. at 478, *King* v. *Smith,* 392 U.S. 309, 334 (1964), the Supreme Court further stated [397 U.S. at 479]:

> "Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family".

This is the very situation faced by the State in the instant case. Given the fact that it had already made a double payment to plaintiffs, it must choose either to recoup this payment or to allow the expenditure of funds over and above the required level of payments to the plaintiffs which expenditure will ultimately result in detriment to the rest of the State's welfare recipients. It has chosen to recoup these monies over a six month period, and this choice does not violate the Social Security Act. A state may sustain as many families as it can. *Dandridge* v. *Williams,* 397 U.S. at p. 479.

What this Court said in *Hagans* v. *Wyman,* 471 F. 2d 347, is consonant with *Rosado* v. *Wyman, supra,* and *Dandridge* v. *Williams, supra,* and sets forth why the statutory claim here, as in those cases, is of no merit. Circuit Judge HAYS said at pp. 349-350:

> "Since the state has a limited amount of funds available to allocate to welfare recipients, the recoupment regulation is reasonably designed to ensure that there are sufficient funds available to all recipients on the level set by the state legislature. By receiving the advance payment plaintiffs have gotten more than the normal grant. Without the recoupment regulation, the plaintiffs would be in a preferred position over all the other welfare recipients who have paid their full rent out of the normal grant. * * * If there were no recoupment provision, there would be a disincentive for welfare recipients to manage their grants so as to have funds available to pay their rent each month. The recoupment provision encourages proper money management, an entirely acceptable, if incidental, purpose of the welfare legislation."

The New York Regulation basically covers the actual, total cost of housing an AFDC family; it does not diminish the gross allowance of such family; it is as fair to the overall program as the Regulations which this Court upheld in *Taylor* v. *Lavine*, —— F. 2d —— decided by this Court on May 14, 1973, Docket Nos. 73-2731 and 73-2671.

A state satisfies the requirements of the Social Security Act by giving "some aid" to all eligible children, even though the amount of this aid may not fulfill the current needs of these children. Indeed, since states can, consistent with the Social Security Act, give but a small percentage of the actual standard of need, *Rosado* v. *Wyman, supra*, there plainly is nothing in the federal law that mandates that *all* needs of a child be met.

The basic confusion in appellees' argument is a confusion of the concept of initial eligibility with the subsequent determination of theamount of aid. It is a violaton of the Social Security Act to refuse aid to an otherwise eligible individual. *Townsend* v. *Swank*, 404 U.S. 282 (1971); *King* v. *Smith*, 392 U.S. 309 (1964). In *Townsend* v. *Swank, supra*, the Supreme Court stated (404 U.S. at 286):

> ". . . a state eligibility standard that *excludes* persons eligible for assistance under federal AFDC standards violates the Social Security Act . . ." (Emphasis added).

However, there is nothing in that Act that requires a state to meet current needs once a recipient has been deemed eligible, as *Townsend* implicitly recognizes in citing *Dandridge* v. *Williams* for the acknowledged proposition that a state has undisputed power to set the level of benefits.

In *Jefferson* v. *Hackney*, 406 U.S. 535 (1972), the Supreme Court upheld the Texas welfare system which placed a ceiling on the amount of money that the state could spend on welfare. In rejecting plaintiffs' argument that a differ-

ent system of computing resources would lead to more people being eligible for welfare, the Court rejected the application of 42 U.S.C. § 602(a)(10)—holding that this section was meant to deal solely with payment of benefits to people placed on waiting lists because of a shortage of state funds. 406 U.S. at 545. The Supreme Court continued [406 U.S. at 545]:

> "It does not, however, enact by implication a generalized federal criterion to which States must adhere in this computation of standards of need, income, and benefits. Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellants' invitation to change this longstanding statutory scheme simply for policy consideration reasons of which we are not the arbiter".

The broad discretion given the states under the Social Security Act clearly permits recoupment consistent with the rationale of *Rosado* and *Dandridge*.*

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* The balancing between the needs of children and the finite resources of the State is further illustrated by the Supreme Court's decision in *Wyman* v. *James*, 400 U.S. 309 (1971). There, the Court held that the refusal of a mother with children to allow a home visitation by the agency may result in the termination of benefits to the entire family. The Court noted that the choice was entirely up to the welfare mother, 400 U.S. at 324, and stated [400 U.S. at 325]:

> "The only consequence of her refusal is that payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits".

In analogous situations, the federal courts have sustained the denial of AFC benefits to families where the parent refused to assign deeds to real property or other assets to the agency, *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd.* 393 U.S. 323 (1969); *Charleston* v. *Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971), aff'd. 405 U.S. 970 (1972), even where the Court specifically noted that "the refusal of aid to the parent means deprivation to the child". *Charleston* v. *Wohlgemuth, supra*, 332 F. Supp. at 1184.

In the light of these cases, it is clear that 18 NYCRR § 352.7(g)(7) also does not violate 42 U.S.C. § 602(a)(7), which states that a state "shall take into consideration any other income and resources of any child or relative" in determining need. Once again, this section relates to *eligibility* for welfare assistance, and the courts have construed 602(a)(7) in cases which were concerned solely with whether, in determining eligibility for assistance, a state agency could make an assumption that a man not legally obligated to support a child was deemed to be supporting the child. *Lewis* v. *Martin*, 397 U.S. 552 (1970); *King* v. *Smith, supra*. The Supreme Court stated in *King* v. *Smith* [392 U.S. at 320]:

> "This appeal raises *only* the question whether the State may deal with these problems in the manner that it has here—by *flatly denying* AFDC assistance to otherwise eligible dependent children". (Emphasis added).

The instant case clearly differs from the *King* v. *Smith* situation, as here the state has already established eligibility and determined need for the plaintiffs and has paid the amounts necessary according to this determination. As Judge LUMBARD held in the first appearance of this case before this Court, "the New York statute is directed not at eligibility . . . but at the method of payment of concededly due welfare grants". *Hagans* v. *Wyman, supra*, 462 F. 2d at 932. The State has not assumed that resources were forthcoming from a source that had no legal obligation to supply these resources. Plaintiffs are thus receiving assistance pursuant to the mandate of 42 U.S.C. § 602(a)(7). The only variance is that plaintiffs have received a larger part of their grants in an earlier period, but the *total amount* of their grants took into consideration "any other income and resources". Nothing more is required by the Social Security Act or by the cases interpreting it.

In *Acosta* v. *Swank,* 312 F. Supp. 765 (N.D. Ill. 1970), an Illinois statute requiring recoupment of emergency payments caused by mismanagement was upheld as not violative of the Social Security Act.* In *Cooper* v. *Laupheimer,* 316 F. Supp. 264 (E.D. Pa. 1970) a similar Pennsylvania statute was struck down as violative of 42 U.S.C. § 602 (a)(10)—requiring the furnishing of aid to all eligible individuals. However, the decision of the Court in *Cooper* does not mention *Dandridge* v. *Williams* at all. Since *Dandridge* concerns the interpretation of the very same statutory provision relied upon in *Cooper* and interprets the Social Security Act provisions differently from the interpretation of the Pennsylvania District Court, the authoritative value of the *Cooper* decision is minimal. In the light of the further limitation of § 602(a)(10) by the Supreme Court in *Jefferson* v. *Hackney, supra,* the aforementioned discussion of 42 U.S.C. § 602(a)(10) plainly refutes the interpretation by the Court in *Cooper.*

Bradford v. *Juras,* 331 F. Supp. 167 (D. Oregon, 1971), concerned an Oregon provision that the failure of a recipient to report an income tax refund would result in recoupment to the extent of the monies unreported. A divided court struck down this provision as violating the "spirit and intent" of the Social Security Act, but did not indicate any provisions of the Act that were violated. Indeed, the cases relied upon were *King* v. *Smith, supra,* an eligibility case, and *Cooper,* which is of dubious validity.

More appropriate is *Lomax* v. *Lavine,* —— F. Supp. —— (S.D.N.Y.) [72 Civ. 2457, decided July 31, 1972], in which the Southern District Court was faced with a motion to preliminarily enjoin 18 NYCRR § 352.7(g)(1), an anal-

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* This opinion was withdrawn [318 F. Supp. 1348 (N.D. Ill. 1970]) because the Illinois regulation as to duplicate payments was changed as a result of negotiations between HEW and Illinois officials being conducted while the Court was hearing the case. On remand, the Court stated that plaintiffs failed to state a cause of action and that jurisdiction was lacking. 325 F. Supp. 1157.

ogous provision calling for recoupment of monies obtained by the fraudulent signing of duplicate checks. Plaintiffs there relied on the same statutes and regulations that are relied upon by plaintiffs in the instant case. The Court indicated its awareness that the recoupment will adversely affect the children of the plaintiffs, but held that this was unavoidable [citing *Wyman* v. *James, supra,* and *Snell* v. *Wyman, supra*]. The motion for a preliminary injunction was denied on the grounds that plaintiffs showed no probability of success. Whether the acquisition of extra monies was through fraud or misallocation, the effect of recoupment on the children remains the same. As this case shows, it is clear that 18 NYCRR § 352.7(g)(7) does not violate the Social Security Act.

2. 18 NYCRR § 352.7(g)(7) does not violate HEW regulations.

The Court below held that 18 NYCRR 352.7(g)(7) violates the regulations promulgated by the Department of Health, Education and Welfare. In particular, the Court cited a violation of 45 CFR § 233.20(a) and further indicated that HEW has likewise decided that the New York recoupment policy violates that regulation. It is respectfully submitted that 18 NYCRR 352.7(g)(7) does not violate any HEW regulation.

45 CFR § 233.20(a) provides in pertinent part:

> "A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:
>
> * * *
>
> (3)(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment:
>
> * * *
>
> (c) Only such net income as is actually available for current use on a regular basis will be considered; (d) current payments of assistance will not be reduced

> because of prior overpayment unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment; . . ."

Plaintiffs initially claim that 45 CFR § 233.20(a)(3)(ii)(c) mandates that the amount of the assistance payment must consider only income "actually available for current use", and that the State is violating this provision by reducing their assistance checks over the next six months to recoup the shelter advance. However, this regulation is clearly meant to determine whether a recipient is *eligible* for welfare and, if so, what the average monthly grant should be. That is exactly what the State has done as to all of the plaintiffs. There is nothing in subsection (c) that requires that the average monthly grant so determined be actually paid to the recipient during each month. It is totally consistent with the regulation for the state to pay portions of the monthly grant in advance, and so pay less in future monthly grants. The total amount paid will be the same in any case, and the State will have considered income "as is actually available for current use on a regular basis". Subsection (c) is thus an eligibility provision and does not concern reductions of current monthly payments, as that is specifically the concern of the subsection (d) overpayment provision which makes no mention of subsection (c).

Subsection (d) provides that current payments of assistance cannot be reduced in the case of prior overpayments unless the recipient has currently available resources in the amount by which the agency proposes to reduce payment. However, the advances made to plaintiffs to forestall eviction are not "overpayments". The Court in *Acosta* v. *Swank, supra,* specifically rejected this argument, and held that a duplicate emergency payment was merely a "modification of payment". 312 F. Supp. at 768. Furthermore, the HEW brief submitted to the District Court specifically states that subsection (d) "is not directly involved here"

and defines "overpayments" as "mistaken payments" [HEW brief, p. 8, fn. 3]. While there may be a rational policy behind not penalizing a recipient for a mistake of a state agency, this policy does not apply to a situation where the monies were advanced to the recipient to forestall eviction caused by the recipient's misallocation of her shelter grant.

Nor can the advance allowance for rent be considered a "loan" within the meaning of the HEW regulations requiring that monies that a recipient is obligated to repay to others not be considered available in determining the assistance payment. See 45 CFR § 233.20(a)(iv)(b). Obviously, the amount advanced is part of the assistance payment itself—which was determined on the basis of available resources pursuant to 42 U.S.C. 602(a)(7). The Court in *Acosta* v. *Swank, supra,* 312 F. Supp. at 468, summarily rejected this contention, and the HEW brief submitted in the Court below does not support appellees' interpretation.

3. The interpretation of HEW of 18 NYCRR 352.7(g)(7) is in conflict with the Social Security Act.

It is clear that whatever force and effect the HEW regulations have must be derived entirely from the statute under which they were enacted. *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45 (1962); *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1962). Where the regulation conflicts with the statute, it is without force and effect.

Whatever right the Secretary of HEW has to make rules or regulations, 42 U.S.C. § 1302, he may not use them to veto State legislation and regulations which comply with congressional requirements. The language of § 1302 restricts his rule making power to that necessary to the functions Congress has given him. It is the Congressional statute which is the measure of compliance. *Rothstein* v. *Wyman,* 398 U.S. 275 (1970); *Rosado* v. *Wy-*

man, supra; *King* v. *Smith, supra; Kandelin* v. *Social Security Board,* 136 F. 2 . 327 (2d Cir. 1943); *Ford* v. *Ribicoff,* 199 F. Supp. 822, 828 (E.D. Tenn. 1961).

The regulations of HEW are entitled only to weight as an interpretation of Congressional provisions. *Lewis* v. *Martin, supra; Rosado* v. *Wyman, supra; Solman* v. *Shapiro,* 300 F. Supp. 409, 416 (D. Conn. 1969), *aff'd.* 396 U.S. 5 (1969). Even as an interpretation of the statute, the regulations are not binding. *Rosado* v. *Wyman, supra* at page 415; *Kandelin* v. *Social Security Board, supra.*

The brief of HEW filed in the Court below appeared to support plaintiffs' interpretation of 45 CFR § 233.20(a)(3)(ii)(c), which implements 42 U.S.C. 602(a)(7). However, that provision of the Social Security Act does not require that current needs be met (see *supra*). The Supreme Court has ruled that it is not contrary to the Social Security Act that the states give recipients benefits that do not meet their standard of need, *Rosado* v. *Wyman, supra,* and that the states can establish maximum grant limits that may result in some children receiving less aid than others, *Dandridge* v. *Williams, supra.* There is no difference in New York's setting a maximum limit on payments through the recoupment of advances than there is in Maryland's setting a maximum limit on payments to large families that results in lower payments to the children affected. In the light of these Supreme Court decisions, this view of HEW is in conflict with the Social Security Act.

It is difficult to comprehend HEW's argument that the Social Security Act mandates that the State consider income and resources "which are actually at the recipient's disposal in a particular month". [HEW brief, p. 4]. If HEW's interpretation is to be taken literally, every welfare recipient would have a right under the Social Security Act to receive aditional grants from the state for a given month each time they misallocated any of their

prior grants. There would then be no requirement, much less any incentive, for recipients to manage their grants —with the only restriction being that the state can put these recipients on restrictive payments after they have misallocated a number of grants. Obviously such an interpretation would encourage misallocation, which is exactly what the Social Security Act purports to avoid. See 42 U.S.C. 602(a)(14).

Indeed, the panacea of protective payments is illusory. 42 U.S.C. 603(a) puts a 10% limitation for federal reimbursement on the number of recipients of aid to dependent children who may be put on protective payments, and New York is rapidly approaching that limit. Should the limit be reached, the State fisc will be in jeopardy if recoupment is not an available alternative.

Moreover, HEW's interpretation of 45 CFR § 233.20 (a)(3)(ii)(*c*) is in direct contradiction to 45 CFR § 233.20 (a)(3)(ii)(*d*). Subsection (d) permits an exception allowing a reduction in grant where a recipient willfully withholds information about income or resources. HEW has approved and the District Court has upheld 18 NYC RR § 352.7(g)(1) under this exception, which provides for recoupment of fraudulently endorsed duplicate checks. *Lomax* v. *Lavine, supra,* p. 15. Therefore, HEW allows the presumption in duplicate check cases that the extra monies has been properly applied to the needs of the children, but rejects this presumption in duplicate rent cases. HEW's approval of recoupment in the analogous duplicate check cases is thus contradictory to their position in the instant case, and points clearly to the conclusion that section 602(a)(7) and the regulations thereunder are not concerned with the meeting of current needs on a monthly basis.

The position of HEW resulted in a paradox. HEW does not require that the states reimburse recipients who misallocate their monthly payments [HEW brief, pp. 3, 10],

yet apparently requires that states which do reimburse misallocations of payments to forestall eviction do so at their own expense. Should such a remarkable interpretation be upheld, it will encourage states to dispense with duplicate payments altogether.

HEW pointed out that, as an alternative, defendants can offer plaintiffs "emergency assistance" pursuant to Section 350-j of the New York Social Services Law. This is incorrect. 18 NYCRR § 372.2(c) prohibits the granting of emergency assistance where application is made because of "loss, theft or *diversion of grant already made*". See *Matter of Howard* v. *Wyman*, 28 N Y 2d 434 (1972). Moreover, even if emergency assistance were available, the Department would not be required to forestall the eviction, as HEW specifically has ruled that the State need not make the advance payments that have been made in the instant case. At most, the Department would have to find other housing for the evicted family, presumably "welfare hotels" because of the current housing shortage. It is reasonably certain that the needs of the children are better served staying in their own homes on a slightly reduced budget than enduring the vicissitudes of eviction and relocation into uncertain quarters.

New York has set up a humane program of preventing welfare recipients from being evicted and placed at the mercy of the constricted New York housing market. The Department of Social Services has determined that it can offer this service in light of its limited budget if it can recoup the allowances advanced. The Supreme Court stated in *Dandridge* v. *Williams, supra* [397 U.S. at 487]:

> ". . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the muriad of potential recipients."

The courts should not be used to enjoin New York's effort to aid welfare recipients caught in the current housing shortage consistent with the limitations on the State's budget.

4. New York's new Regulations effective in May, 1974, are even more considerate of the recipient's need than the prior Regulation.

These Regulations, set forth *supra*, at pp. 4-5 limit the amount that may be recouped to 10% of household needs in ordinary circumstances. On this basis, recoupment of an advance to prevent eviction would be spread over a ten month period rather than a six month period as was the practice in the past. Thus, in the case of Mrs. Siemiller, one of the appellees, who was receiving $251.00 a month of assistance, the recoupment under the new Regulation would have been at the rate of $25.10 a month rather than at the rate of $43.33 a month. The impact of the new recoupment regulation is substantially less on the family's current needs. The State, having in effect been compelled to advance rent, is seeking to obtain recoupment on as easy terms as it can without endangering its overall ability to carry out its assistance programs.

CONCLUSION

The case should be remitted to the District Court to dismiss as no longer constituting a real controversy or, in the alternative, the decision of the District Court should be reversed and the complaint dismissed.

Dated: New York, New York, June 12, 1974.

Respectfully submitted,

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